IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RFA No. 134 of 1998.
Reserved on : 20-6-2007.
Date of Decision: July 20 , 2007

HPSIDC. Appellant.

Versus

M/s Tej Straw Boards (P) Ltd. and others. Respondents.

Coram

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting[1]? Yes.

For the appellant : Mr. Balwant Kukreja, Advocate.

For the respondent No.1 to 4. : Mr. Anand Sharma, Advocate.

Respondents 5 to 8 ex parte.

None for respondent No.9

Surinder Singh, J

The appellant-plaintiff has filed the instant appeal feeling aggrieved and dis-satisfied by the judgment and decree passed ex-parte by the District Judge, Shimla in Case No. 4-S/1 of 1996 dated 15.12.1997 whereby the suit filed by the plaintiff was dismissed.

The defendant No.1 M/s Tej Straw Board (P) Limited, a private limited company duly incorporated under the provisions of Companies Act, 1956 of which the defendants No.2 to 8 are the Directors. It applied for the grant of term loan to the tune of rupees 2.55 lacs for the construction of factory building, purchase of land, plant and machinery for setting up unit for the manufacture of paper/board at Kala Amb, District Sirmaur, H.P. The said loan was sanctioned in favour of defendant No.1 by the Plaintiff Corporation in July/August,

[1] Whether reporters of the Local papers are allowed to see the judgment? Yes.

1980. The Company, aforesaid, agreed to pay the interest on the term loan facility at the rate of 9.5% per annum. For securing the repayment of loan and interest thereon, the defendants executed term loan agreement and hypothecation agreement on 22.10.1980 in favour of the Plaintiff Corporation for repayment of the principal amount, interest accrued thereon and other moneys which may be due to the Plaintiff Corporation. The loan was agreed to be repaid in six monthly instalments beginning from 10.12.1982 and ending on 10.6.1990. It is alleged that the defendants-respondents failed to adhere to the repayment schedule. The proforma defendant/respondent (H.P. Financial Corporation) was obliged to take over possession of the assets of the industrial concern of the defendant-respondents on 6.10.1987 under Section 29 of the H.P. Financial Corporation Act, 1951. Thereafter, the assets of the industrial concern were sold for Rs. 28.50 lacs by the proforma respondent to Shri Mohinder Singh and M/s Vima International Limited, Delhi after providing due opportunity to the defendants-respondents. The sale proceeds were shared between the Plaintiff and proforma respondent, aforesaid, as follows:

a) H.P.S.I.D.C. (Plaintiff) Rs. 2, 30, 043.00

b) H.P.F.C.
(Proforma Respondent No.9): Rs. 26, 19, 957.00

After adjusting the sale proceeds received from the respondent No.9, on 9-11-1995, there remained a short fall to the tune of rupees 3, 03, 649.94 paise for the payment of which the defendants-respondents No. 2 to 8 being Guarantors were liable to pay to the plaintiff. They were asked to liquidate the aforesaid amount with interest vide notice dated 25.11.1995 within one month but nothing was deposited and the defendants-respondents did not respond to the notice, aforesaid. Therefore, a suit for the recovery for the remaining

amount was filed against the defendants-respondents No.2 to 8 jointly and severally together with cost and future interest at the contractual rate with half yearly rests and also prayed to pass a preliminary decree in favour of the Plaintiff Corporation and against the defendants-respondents jointly and severally for the aforesaid sum along with pendent lite and future interest with costs.

The respondents-defendants were duly served. No one put in appearance for defendants except for defendant-respondent No.1 and 3. Shri Rajeev Mehta, Advocate had initially put in appearance for defendants No.1 and 3, even he also absented himself. As such, they were also proceeded ex-parte.

The plaintiff-appellant led ex-parte evidence and examined Shri M.K. Chaudhary, Financial Adviser of the Plaintiff Corporation. After hearing the learned counsel for the Plaintiff, the suit was dismissed by the District Judge on the point of limitation. The relevant portion of the judgment is extracted here under:

> "3. The claim of the plaintiff is barred by time on the face of it. The loan was raised and the documents were executed in October, 1980. The first default in the repayment schedule was made on 10.6.1983, per averment in para 10 of the plaint. Defaults were made in payment of subsequent instalments also. The last instalment was due to be paid on 10.6.1990, per contents of para 5 of the plaint. The repayment schedule provided for the first instalment on 10.12.1982 and the last instalment on 10.6.1990. Thus, the cause of action, for recovery of different instalments had been accruing to the plaintiff from 1983 when the first default was allegedly made till 10.6.1990 when the deposit in the payment of last instalment was made. No cause of action can be said to have accrued to the plaintiff after 10.6.1990 when the default in the payment of last instalment was

made. The limitation for filing a suit for recovery of money is three years. Thereafter, the suit was required to be filed within three years of the accrual of cause of action. As already noticed, cause of action for recovery of different instalments accrued on different dates from June, 1983 to June, 1990 when the defaults were made. Cause of action for filing suit for recovery of the last instalment accrued in June, 1990. Thus, the claim even for recovery of last instalment by legal process, became barred by time some time in June,1993. The suit was filed in January, 1996 or say long after the expiration of the period of limitation provided by law.

4. The plaintiffs have claimed the limitation from the date when the assets and properties of defendants No.1 to 8 were disposed of by defendant No.2 to release the debt due to it. The date of the disposal of the assets is alleged to be 9.11.1995. It is not understood how the plaintiff can claim limitation from the date when the assets of the defendants No.1 to 8 were disposed of by defendant No.1 to realize the money due to it. It is one of the fundamental principles of law of limitation that once the period of limitation starts running, no subsequent event can stop or interrupt and that on the expiry of period of limitation, the remedy becomes barred. The period of limitation cannot be extended by any subsequent event except two provided by the statute itself, viz., namely the acknowledgement of liability, in writing, under Section 18 of the Limitation Act and part payment of debt, accompanied by a writing in the hand of or signed by the debtor or his agent, under section 19 of the Limitation Act. Such acknowledgment or part payment has to be made within the period of limitation, so as to give a fresh deed of limitation to the creditor. In the present case, the plaintiff has neither pleaded nor proved that the liability was acknowledged by the defendants under

> Section 18 of the Limitation Act, or part payment was made under Section 19 of the Limitation Act, at any point of time within three years of the start of limitation".

Now the plaintiff's grievance in this appeal is that the findings of learned District Judge are contrary to law and facts because when the hypothecated assets were sold by the proforma respondent No.9 and the proceeds were received by the plaintiff from the said respondent on 9-11-1995, the same were credited to the account of the defendant-respondent No.1. The liability of the said respondents was determined and the suit for the recovery of the balance amount was filed. The limitation in such a situation would start from the date of sale of assets and payment to the plaintiff-appellant. Section 18 or 19 of the Limitation Act was not attracted in the said case. It was only Article 113 of the Limitation Act which would govern the present case.

I have heard learned counsel for the parties and have examined the evidence on record.

Shri Balwant Kukreja counsel for the plaintiff has supported the grounds taken in appeal.

Contra, Shri Anand Sharma Advocate for the respondents while supporting the impugned judgment and decree has vehemently argued that the agreement aforesaid contain the repayment schedule mentioning the due date of each instalment. According to the case of the plaintiff, the defendants-respondents did not make any payment as per the loan agreement. Thus the suit was not filed within the period of limitation of three years, more specifically, when there is no averment that the balance was also confirmed within time. Further, according to him, notice cannot be expected to be issued after a period of ten years with respect to a time barred debt. Therefore, the appeal merits dismissal.

I have given my thoughtful considerations to the rival contentions of the parties.

The loan agreement Exhibit P12 stands admitted inter-se the parties. It is also an admitted fact that the loan was advanced to the defendant-respondent No.1 through its Directors on 22.10.1980. Necessary documents were also executed by them on the same day. It was agreed to be repaid with interest at the rate of 9.5%. The defendants had also mortgaged their property by deposit of the title deeds as security for the repayment of the loan. The respondents No. 2 to 8 are the Directors of defendant No.1. They had executed guarantee deeds rendering themselves personally liable to the repayment of the balance amount in case the defendant Company failed to discharge its liability. The defendants had also taken financial assistance from HPFC (Proforma respondent No.9). It is also an admitted fact that under Section 29 of the Financial Corporation Act, 1951, the proforma respondent HPFC had sold the mortgaged assets to recover the loan. From such sale, they recovered a sum of Rs. 28.50 lakhs. After adjusting the sale proceeds between the plaintiff and the HPFC on 9.11.1995 there was a shot fall of Rs. 3, 03, 641.94 paise. Despite notice it was not paid, thus a civil suit for recovery was filed on 11.1.1996, i.e, within one year of the adjustment of the part amount as aforesaid. Whereas the District Judge dismissed the suit as being barred by limitation as aforesaid. It appears that the District Judge has not noticed clause 7 of the indemnity bond in Schedule III of the agreement.

The premise on which the District Judge proceeded is that the loan transaction and the mortgage deed are one composite transaction which was inseparable. The Supreme Court in Civil **Appeal No. 1971 of 1998 HPFC v/s Smt. Pawna** and others

decided on December 18, 2003, was confronted with the similar situation and it was held that the aforesaid view was entirely erroneous. It was further held that:

> "..It is settled law that a contract of indemnity and/or guarantee is an independent and separate contract from the main contract. Thus the question which they required to address themselves, which unfortunately they did not, was when does the right to sue on the indemnity arose. In our view, there can be only one answer to this question. The right to sue on the contract of indemnity arose only after the assets were sold off. It is at that stage only that a suit for recovery of the balance could have been filed. Merely because the Corporation acted under Section 29 of the Financial Corporation Act did not mean that the contract of indemnity came to an end. Section 29 merely enabled the Corporation to take possession and sell the assets for recovery of the dues under the main contract. It may be that on the Corporation taking action under Section 29 and on their taking possession they became deemed owners. The mortgage may have come to an end, but the contract of indemnity, which was an independent contract, did not. The right to claim for the balance arose, under the contract of indemnity, only when the sale proceeds were found to be insufficient".

In the instant case, it is an admitted position that the sale took place on 9.11.1995, it is only after that date the question of right to sue on the indemnity clause 7 supra arose, defendants-respondents No.2 to 8 had created the equitable mortgage as aforesaid in respect of the amount advanced to them with interest accrued thereon.

The suit having been filed within one year as aforesaid, was thus well within limitation. Therefore, the findings and reasonings

given by the learned District Judge to hold that the suit was barred by limitation are quite erroneous.

Accordingly, the appeal is allowed and the impugned judgment and decree passed by learned trial Court is hereby reversed. Consequently, the appellant-plaintiff is held entitled to the main relief claimed in the suit.

Accordingly, the suit filed by the plaintiff Corporation is decreed against the defendant-respondents, jointly and severally to the tune of Rs. 3,03, 649.94 paise with interest @ 9.5% per annum w.e.f. 20.11.1995 with costs, till the realization of the entire decretal amount. The matter is accordingly disposed of.

(Surinder Singh)
Judge.

July 20, 2007.
(bm)